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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. [redacted] 90

ANHEUSER-BUSCH, INCORPORATED, ET AL.,
Petitioners,

vs.

MATTHEW S. KAINZ AND ROSE KAINZ, COPARTNERS, DOING BUSINESS AS MATT & NEAL'S LIQUORS, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

SUBJECT INDEX.

	PAGE
Petition for a Writ of Certiorari	1
Opinions Below	2
Jurisdiction	2
Summary and Statement of the Matters Involved	2
Questions Presented	7
Rules and Statutes Involved	8
Reasons for Granting the Writ	10
Conclusion	20

CASES CITED.

Ackermann v. United States, 340 U. S. 193, 195 (1950) 12

American Can Co. v. Russellville Canning Co., 191 F. (2d) 38 (C. A. 8, 1951) 14, 16

Azoo v. Beloit Dairy Co., et al., 50 C 882 (unreported order and memorandum entered February 6, 1951) .. 10

Birk, et al. v. The Borden Company, 48 C 1488 (unreported order entered November 23, 1950) 10

Bowman Dairy Co., et al. v. United States, 341 U. S. 214, 217-8 (1951) 11

Bruce's Juices v. American Can Company, 330 U. S. 743 (1947) 12, 13

Corn Products Refining Co. v. Federal Trade Commission, 324 U. S. 726 (1944) 14, 15

Elizabeth Arden, Inc. v. Federal Trade Commission, 156 F. (2d) 132 (C. A. 2, 1946) 15

Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F. (2d) 988 (C. A. 8, 1945) 15

Farmers Co-op. Oil Co. v. Socony Vacuum Oil Co., 133 F. (2d) 101 (C. A. 8, 1942) 17

Federal Trade Commission v. Cement Institute, et al., 333 U. S. 683 (1948) 16

Fisch v. General Motors Corp., 169 F. (2d) 266 (C. A. 6, 1948), cert. denied 335 U. S. 902 18

Gilbert v. Clark, D. C. Mass., April 7, 1952, 17 Fed. Rules Serv. 23a33 18

Glenn Coal Company v. Dickinson Fuel Company, 72 F. (2d) 885 (C. A. 4, 1934) 16

Hickman v. Taylor, 329 U. S. 495, 497 (1946) 12

Hipps, et al. v. Bowman Dairy Company, 48 C 1478 (unreported order and memorandum entered April 25, 1950) 10

Hormel v. Helvering, 312 U. S. 552 (1941) 20

Independence Shares Corp. v. Deckert, 108 F. (2d) 51 (C. A. 3, 1939) 17

Jack v. Armour & Company, 291 Fed. 741 (C. A. 8, 1923) 16

Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co., 342 U. S. 180, 183 (1952) 11

Leishman v. Associated Wholesale Electric Co., 318 U. S. 203, 205 (1943) 12

McGrath v. Abo, 186 F. (2d) 766 (C. A. 9, 1951) 18

Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 247 (1940) 12

Newsom v. E. I. du Pont de Nemours Co., 173 F. (2d) 856 (C. A. 6, 1949), cert. denied 338 U. S. 824 18

Oppenheimer v. F. J. Young & Co., 144 F. (2d) 387 (C. A. 2, 1944) 17

R. F. C. v. Menihan Corp., et al., 312 U. S. 81, 82 (1941) 12

Reeves v. Beardall, Exec., 316 U. S. 283, 284 (1942) 12

Rothensies v. Electric Storage Battery Co., 329 U. S. 296 (1946)..... 18
Sacher, et al. v. United States, 343 U. S. 1, 4-5 (1952).. 11
Shaffer, et al. v. United States Rubber Company, et al., 99 F. Sup. 886 (N. D. Ill., 1951)..... 10
Shaw's Inc. v. Wilson-Jones Co., 105 F. (2d) 331 (C. A. 3, 1939).....14, 15
Standard Oil Co. v. Federal Trade Commission, 340 U. S. 231 (1951)..... 14
The Ruberoid Co. v. Federal Trade Commission, Dkt. No. 504, Oct. 1951 Term, decided May 26, 1952....12, 13
United States v. Reynolds, et al., Dkt. No. 637, Oct. 1951 Term, cert. granted April 7, 1952..... 12
William Rohlfing, et al. v. Cat's Paw Rubber Co., et al., 99 F. Sup. 886 (N. D. Ill., 1951)..... 10

STATUTES CITED.

Robinson-Patman Amendment to Clayton Act (15 U. S. C. 13).....5, 6, 7, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20
Section (a).....3, 8, 11, 12, 19
Section (b)..... 9
Section (e).....3, 9, 11, 14, 15, 19
Section (f)..... 3, 9
Section 4 of Clayton Act (15 U. S. C. 15).....2, 15, 16
28 U. S. C., Section 1254 (1)..... 2
Sherman Act (15 U. S. C. 1)..... 20

RULES CITED.

Federal Rules of Civil Procedure
Rule 10 (b)..... 3
Rule 18 (a)..... 3
Rule 20 (a).....3, 5, 6, 7, 8, 10, 11, 12, 18, 20
Rule 21..... 3
Rule 23 (a) (3)....2, 3, 5, 6, 7, 8, 10, 11, 12, 16, 17, 18, 19

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Anheuser-Busch, Incorporated, Home Delivery, Incorporated, Ralph E. Meech, Jr., and August R. Roselle, pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit, entered on February 14, 1952, reversing a final order of the District Court which dismissed the complaint.

OPINIONS BELOW.

The order and opinion of the District Court (R. 18-26) are unreported. The opinion of the Court of Appeals appears (R. 41-53) and is reported in 194 F. (2) 737 (C. A. 7th 1942).

JURISDICTION.

The decision of the Court of Appeals was entered on February 14, 1952 (R. 53). A timely petition for rehearing, filed February 29, 1952 (R. 55), was denied on March 17, 1952 (R. 67). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

SUMMARY AND STATEMENT OF THE MATTERS INVOLVED.

On March 15, 1951 respondents (plaintiffs below) brought this action under Section 4 of the Clayton Act to recover treble damages for violations of the Robinson-Patman Amendment to the Clayton Act. The action was brought jointly by four retail liquor stores and as a class action under Rule 23(a) on behalf of seventy-two other retail liquor stores listed in an exhibit to the Complaint (R. 3, 7-12).

All seventy-six claimants operate retail liquor stores located in widely separate parts of Chicago and its suburbs and have purchased "Budweiser" beer from the defendant, Anheuser-Busch, Inc., for resale at their respective stores. The other defendant, Home Delivery Incorporated, has

also purchased "Budweiser" from Anheuser-Busch and, as its name implies, resells it for delivery to the home (R. 2).

The Complaint alleges that each of the seventy-six respondents has three separate and distinct claims for treble damages:

> (1) A claim for damages against Anheuser-Busch based on alleged sales at prices higher than the prices charged Home Delivery in violation of Section 2(a) of the Robinson-Patman Amendment;
>
> (2) A claim for damages against Anheuser-Busch based on furnishing services and facilities to Home Delivery not accorded the respondents in violation of Section 2(e) of the Robinson-Patman Amendment;
>
> (3) A claim for damages against Home Delivery for knowingly inducing Anheuser-Busch to grant or knowingly receiving discriminatory prices from Anheuser-Busch in violation of section 2(f) of the Robinson-Patman Amendment (R. 5, 6).

Petitioners filed a motion under Rule 21 to drop three of the four named claimants and sever their claims on the ground that joinder was improper under Rules 18(a) and 20(a) because the claims of the different respondents do not arise out of the "same transaction, occurrence, or series of transactions or occurrences" and there is no "question of law or fact common to all of them" (R. 14). Petitioners also filed a motion to dismiss the class action on the ground that it was not a proper spurious class action under Rule 23(a)(3) because the persons bringing the action are not "persons constituting a class," they do not adequately "represent" the class, there is no "common question of law or fact" and the relief sought is not "common" (R. 13). (A third motion to require separate statements of claim under Rule 10 (b) is not involved in this petition.)

In support of the motions, A. B. Hulls, then Manager

of the Chicago Branch of Anheuser-Busch, filed his affidavit in which he stated that the seventy-six respondents are only a small fraction of the 2,770 retail liquor stores in the Chicago area, approximately 98% of which buy Budweiser from Anheuser-Busch from time to time; and that purchases by each of the seventy-six respondents have been made individually, at different times, under different circumstances, in different amounts and by separate, independent transactions (R. 15).

An affidavit filed later by one of the attorneys for the respondents does not deny these statements in the Hulls affidavit, but contends that all claims of the seventy-six respondents can be proved by using the same proof and witnesses (R. 17, 18).

Petitioners' motions were granted by the District Court which analyzed the case as follows (R. 23):

> "The alleged claims of each plaintiff herein arise out of a unique series of transactions—defendant Anheuser-Busch's sales to individual plaintiff retail liquor dealers of varying quantities of beer from time to time during the period in controversy. Plaintiffs claim to be engaged in the same business. They claim to have made purchases of Budweiser Beer from defendant Anheuser-Busch from time to time, but there the similarity disappears. They bought beer at different times under different circumstances and by separate and individual arrangements with Anheuser-Busch. No two plaintiffs were engaged in common purchase transactions with Anheuser-Busch and the facts of the purchases of one plaintiff will not establish any claim or right on behalf of any other plaintiff. The extent of the competition with the allegedly favored buyers, if any, will be different as to each plaintiff. The injury to the business of each plaintiff, which is the gist of the statutory claims averred, will be different as to each plaintiff, and proof of injury to one plaintiff will not constitute proof of injury to

> the business of any other plaintiff. In other words, there are 66 different factual situations, each of which is separate from and independent of the others."

Based on this analysis of the questions which would have to be decided in determining whether or not as to each respondent the Robinson-Patman Amendment had been violated, the District Court held that the joinder of the four retail liquor stores was improper under Rule 20(a) because the claims of the different claimants did not arise out of "the same transaction, occurrence or series of transactions or occurrences" and the questions of law or fact would not be common to all of them (R. 23). It also held that the action was an improper spurious class action under Rule 23(a)(3) because it did not appear that there was any real class involved, there was no showing of adequate representation of the class, there were no common question of law or fact and no common relief was sought (R. 21, 22).

The Court of Appeals reversed on the ground that the Complaint alleged "one continuous consistently discriminatory plan" (R. 49) over a period of years of granting lower prices and more favorable services and facilities to Home Delivery than to any of the respondents. It held that the different circumstances and conditions under which different purchases were made, only went to the question of the damages sustained by the particular claimant.

The rationale of the decision of the Court of Appeals was stated as follows (R. 49):

> "Thus, though the purchases were made by plaintiffs separately and apart from each other, at different times, in different quantities and for different amounts and, consequently, the damage to each is different, plaintiffs have charged one continuous consistently discriminatory plan extending over the years, whereby each of them was damaged in the same way, for the same reason, in the same manner, but in a different

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> "Thus, though the purchases were made by plaintiffs separately and apart from each other, at different times, in different quantities and for different amounts and, consequently, the damage to each is different, plaintiffs have charged one continuous consistently discriminatory plan extending over the years, whereby each of them was damaged in the same way, for the same reason, in the same manner, but in a different

> amount. • • • They present, we think, common questions of law and fact; they set up causes of action growing out of the same 'series of transactions or occurrences' thus meeting the requisites of Rule 20(a) as to joinder and Rule 23(a)(3) permitting members of a spurious class to maintain a representative class action."

The basic difference between the District Court and the Court of Appeals stems from the different views with respect to the nature of a violation of the Robinson-Patman Amendment. The District Court granted the motions because it believed that mere difference in price charged or services and facilities rendered was not enough to constitute a violation of the Robinson-Patman Amendment, and that whether or not a violation had occurred with respect to a particular liquor dealer depended upon the circumstances and conditions obtaining at the time the different prices or services and facilities were granted to Home Delivery. On the other hand, the Court of Appeals decided that violation of the Robinson-Patman Amendment was established by a mere granting of a lower price or more favorable services and facilities and that there was nothing left to the case but the question of damages to be awarded to each plaintiff.

This basic difference in construction of the Robinson-Patman Amendment led the Court of Appeals to an application of Rule 20(a) as to joinder of parties and Rule 23(a)(3) as to class actions which is not only contrary to any proper application of the Rules but will inevitably cause confusion in the trial of cases and injustice to litigants.

QUESTIONS PRESENTED.

Does violation of the Robinson-Patman Amendment turn merely upon the granting of a lower price or more favorable services or facilities to one purchaser than to another?

Or does it turn upon the conditions and circumstances at the time the lower price or more favorable services or facilities were granted, such as the effect upon competition between a particular claimant and the favored purchaser, differences in cost of sale or delivery, and necessity of meeting competition?

Where sales to seventy-six claimants for damages for violation of the Robinson-Patman Amendment were made at different times, under different circumstances, in different amounts and by separate and independent transactions (as the District Court found), then do such claims arise out of the "same transactions * * * or series of transactions" and involve questions of law or fact "common" to all of them so as to permit joinder under Rule 20(a)?

Do the several rights sought to be enforced by such claimants present a "common question of law or fact" and call for "common relief" so as to permit a class action under Rule 23(a)?

Do such claimants, being only seventy-two out of nearly three thousand purchasers in the Chicago area, constitute a class, and do the four who join as plaintiffs adequately represent them?

RULES AND STATUTES INVOLVED.

Rule 20 (a) of the Federal Rules of Civil Procedure:

"(a) PERMISSIVE JOINDER. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or facts common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

Rule 23 (a) (3) of the Federal Rules of Civil Procedure:

"(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

* * * * *

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Sections 2 (a), 2 (b), 2 (e) and 2 (f) of the Robinson-Patman Amendment to the Clayton Act (15 U. S. C. 13):

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either

directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing contained in sections 12, 13, 14-21 and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *"

"(b) * * * Provided, however, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

"(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

"(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. * * *"

REASONS FOR GRANTING THE WRIT.

1. It is of utmost importance that the questions in this case, involving as they do the proper construction of the Robinson-Patman Amendment and the Rules for joinder of claims and class actions, be decided by this Court at the first opportunity.

This is the first case to reach the federal appellate courts in which numerous persons claiming damages for violation of the Robinson-Patman Amendment, have attempted to join their claims in one suit and to bring in many others by way of class action.

There are many such cases pending in this and other district courts. In this district alone we have pending the following cases in which a multitude of claimants having claims for damage for violation of the Robinson-Patman Amendment against one or more sellers have joined together in a single action by using the Rules for joinder and class action:

William Rohlfing, et al. v. *Cat's Paw Rubber Co.*, 99 F. Sup. 886 (N. D. Ill., 1951).

Shaffer, et al. v. *United States Rubber Company, et al.*, 99 F. Sup. 886 (N. D. Ill., 1951).

Birk, et al. v. *The Borden Company*, 48 C. 1488 (unreported order entered November 23, 1950).

Azoo v. *Beloit Dairy Co., et al.*, 50 C. 882 unreported order and memorandum entered February 6, 1951).

Hipps, et al. v. *Bowman Dairy Company*, 48 C. 1478 (unreported order and memorandum entered April 25, 1950).

In each of these cases various judges of this district have held that because of the inherent nature of a claim of violation of the Robinson-Patman Amendment, the Rules for joinder of parties and class actions cannot be utilized by multiple claimants.

The importance of the questions involved is illustrated by the statement of the Court of Appeals in this case when it said (R. 51):

> "Perhaps in a case such as this, where each of the parties is entitled to a jury trial, where the transactions are voluminous, complex and intricate and the possible parties so numerous as to be beyond possibility of retention in the memory of any trier of the facts, it may eventuate that the expedient provided is not efficacious in improving practice and procedure. But that possibility does not authorize us so to interpret the rules as to nullify them."

Because of its construction of Sections 2(a) and 2(e) of the Robinson-Patman Amendment, this Court of Appeals held that the Rules compelled it to permit the joinder of four liquor dealers in a single suit and to bring in seventy-two other liquor dealers as parties to a class action; but in doing so recognized that it placed an impossible burden on the trial court.

The proper construction of Rules 20(a) and 23 (a) (3) as applied to actions for damages for violation of the Robinson-Patman Amendment presents questions of general importance to the federal judicial system and to the bar.

This Court has heretofore granted certiorari in numerous cases involving the scope and application of Federal Rules of Civil Procedure because of the importance of clarifying permissible practice under them. *Kerotest Manufacturing Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180, 183 (1952); *Sacher, et al.* v. *United States*, 343 U. S. 1, 4-5 (1952); *Bowman Dairy Co., et al.* v. *United States*, 341

U. S. 214, 217-8 (1951); *Ackermann* v. *United States*, 340 U. S. 193, 195 (1950); *Hickman* v. *Taylor*, 329 U. S. 495, 497 (1946); *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203, 205 (1943); *Reeves* v. *Beardall, Exec.*, 316 U. S. 283, 284 (1942); *R. F. C.* v. *Menihan Corp., et al.*, 312 U. S. 81, 82 (1941); *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 247 (1940); *United States* v. *Reynolds, et al.*, Dkt. No. 637, Oct. 1951 Term, certiorari granted April 7, 1952. Counsel are aware of no previous case in which this Court has considered the subject of permissible joinder and a spurious class suit under the Federal Rules of Civil Procedure.

2. The Court of Appeals' construction of Section 2(a) of the Robinson-Patman Amendment conflicts with *Bruce's Juices* v. *American Can Company*, 330 U. S. 743 (1947), *The Ruberoid Co.* v. *Federal Trade Commission*, Dkt. 504, decided May 26, 1952, and other decisions of the Supreme Court and other Courts of Appeal.

The Court of Appeals in this case decided that the granting of a lower price to Home Delivery was of itself sufficient to constitute a violation of the Robinson-Patman Amendment and that inasmuch as Home Delivery was given a lower price than the respondents over a period of time, there was "one continuous consistently discriminatory plan." It expressly held it was not material that the purchases were made by different respondents separately and apart from each other, at different times, in different quantities and for different amounts, except as such matters might bear on the amount of damages awarded a particular claimant.

That question was before this Court in *Bruce's Juices* v. *American Can Company*, 330 U. S. 743, where the contention was made that sales to certain buyers at discounts automatically made illegal all sales at higher prices including those made to Bruce's Juices. This Court rejected

that construction of the Robinson-Patman Amendment and held that whether or not a difference in price violated the Act depended upon the circumstances and conditions at the time of the sale. This Court said, at pp. 745-6:

> "The Act does not prohibit all quantity discounts but expressly permits them under certain conditions. * * * Congress refused to declare flatly that they are illegal."

Bruce's Juices contended that it was not necessary in proving a discrimination to show that others received a different discount on the same type of can at approximately the same time, claiming that "the scheme of discount" comprehends all cans bought, whatever their size or price. This contention is very similar to the holding of the Court of Appeals that there was "one consistently discriminatory plan" by selling Home Delivery at a lower price. This Court rejected that contention, saying, p. 747:

> "To sustain this position would mean that a sale to a competitor of large cans in 1940 at a higher discount invalidated a sale of small cans to petitioner in 1936, so that the petitioner need not pay the contract price for cans delivered that year."

And again at p. 755:

> "Thus a contract may be made today which has no legal effect under the Robinson-Patman Act. A week later another sale may be made at a different price or at different amounts, and the latter taken into consideration with the former may establish a discrimination."

The decision of the Court of Appeals gives no clew why it refused to follow *Bruce's Juices.*

The decision of the Court of Appeals is also in direct conflict with *The Ruberoid Co.* v. *Federal Trade Commission,* decided May 26, 1952, where this Court held that mere difference in price did not constitute a violation of the Robinson-Patman Amendment and that differences in price

which make only due allowance for differences in cost or which meet an equally low price of a competitor do not violate the amendment.

The decision of the Court of Appeals that there was one continuous violation of the Robinson-Patman Act as to all respondents by reason alone of the lower prices charged Home Delivery also conflicts with *Standard Oil Co.* v. *Federal Trade Commission,* 340 U. S. 231 (1951), where this Court recognized that a lower price charged in good faith to meet an equally low price of a competitor did not violate the Act. It is in conflict with *American Can Co.* v. *Russellville Canning Co.,* 191 F. (2d) 38 (C. A. 8, 1951), where the court in a treble damage case recognized that a suit for damages involved a determination whether or not the lower price affected competition between the claimant and the favored buyer, and whether or not it reflected only a difference in cost of sale or delivery. It also conflicts with the decision in *Shaw's Inc.* v. *Wilson-Jones Co.,* 105 F. (2d) 331 (C. A. 3, 1939), which held that the time at which sales were made to different customers was an important consideration in determining whether the prices charged were discriminatory and that the sales claimed to be discriminatory had to be in the same current of commerce as the sales to the customer claimed to have been favored.

3. The Court of Appeals' construction of Section 2(e) of the Robinson-Patman Amendment conflicts with *Corn Products Co.* v. *Commission,* 324 U. S. 726 (1944) and with decisions of other Courts of Appeal.

In deciding that the respondents charged "one continous consistently discriminatory plan extending over the years" and that the conditions and circumstances under which purchases were made is of no moment, the court has in effect held that the granting of services and facilities to one buyer which are not accorded to others

automatically constitutes a violation of Section 2(e) of the Act.

This decision not only conflicts with the plain wording of Section 2(e), but also conflicts with the decision in *Corn Products Co.* v. *Commission,* 324 U. S. 726 which held that whether or not the granting of services and facilities to one purchaser is or is not a violation of Section 2(e) of the Act depends upon whether or not they were granted to others on proportionately equal terms.

The same test of illegality was recognized in *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.,* 150 F. (2d) 988 (C. A. 8, 1945) and in *Elizabeth Arden, Inc.* v. *Federal Trade Commission,* 156 F. (2d) 132 (C. A. 2, 1946). This decision also conflicts with the principle followed in *Shaw's Inc.* v. *Wilson-Jones Co.,* 105 F. (2d) 331 (C. A. 3, 1939).

In deciding that the Complaint here alleged one continous allegedly illegal practice, this Court of Appeals ignored the plain and accepted construction of Section 2(e) of the Act. It ignored the fact that sales to each of the seventy-six respondents were made at different times and under different circumstances and conditions, and that there would arise in the trial of the case the question whether or not services and facilities were, in fact, granted to Home Delivery which were not granted "on proportionately equal terms" to each of the respondents, and the situation of each of the respondents would be different.

4. The decision of the Court of Appeals is in conflict with decisions of other Courts of Appeal as to the nature of a claim for damages under Section 4 of the Clayton Act, 15 U. S. C., Section 15.

Each of the seventy-six respondents claims damages under Section 4 of the Clayton Act, which provides that any person injured in his business or property by reason of anything forbidden in the anti-trust laws may recover

threefold the damages by him sustained. To recover under Section 4 of the Clayton Act for a violation of the Robinson-Patman Amendment, it is necessary to establish (1) a violation of the Robinson-Patman Amendment as to the particular claimant and (2) that the particular claimant was damaged as a proximate result of the violation. *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. (2d) 885 (C. A. 4, 1934); and *Jack* v. *Armour & Company*, 291 Fed. 741 (C. A. 8, 1923).

The decision of the Court of Appeals fails to recognize that a basic element of such a claim for damages is a violation of the Robinson-Patman Amendment as to each claimant. In this respect it is in conflict with *American Can Co.* v. *Russellville Canning Co.*, 191 F. (2d) 38 (C. A. 8, 1951), where in a suit for treble damages brought under Section 4 of the Clayton Act for violation of the Robinson-Patman Amendment, the court found it essential to first establish as to the single claimant that the amendment had been violated. In that case the court considered it essential to determine not only the fact of a difference in price, but that it affected competition with the claimant, and was not justified by difference in cost. Having so determined, the court then considered the measure of damages.

In the instant case the Court of Appeals seems to have confused a suit for damages under Section 4 of the Clayton Act with a proceeding by the Federal Trade Commission to enjoin a general scheme or plan of merchandising inherently discriminatory without regard to whether or not the Robinson-Patman Amendment was violated with respect to any particular purchaser. Cf. *Federal Trade Commission* v. *Cement Institute, et al.*, 333 U. S. 683 (1948).

5. The decision of the Court of Appeals is in conflict with other Courts of Appeal and District Courts with re-

spect to what constitutes "common relief" under Rule 23(a)(3).

The District Court held in this case that the seventy-six respondents were not seeking common relief because they sought recovery on separate and independent claims based on their individual facts and because recovery would be by way of separate judgments based in each instance upon proved injuries to the particular business of each individual claimant (R. 21-2).

The Court of Appeals reversed on the ground that "common relief" means relief "emanating from the same original source, either by way of grant, contract, tort or statute, where the claims of all beneficiaries flow from the same fountain but are allowed not in a joint judgment but in several judgments." Because the respondents are all claiming damages for violation of the Robinson-Patman Amendment, the relief sought is common (R. 49).

There is widespread conflict between the Courts of Appeals with regard to the meaning of the term "common relief" in Rule 23(a)(3), and the decision of the Court of Appeals in this case is in conflict with all of them.

This construction of the term "common relief" is in conflict with *Farmers Co-op Oil Co.* v. *Socony Vacuum Oil Co.*, 133 F. (2d) 101 (C. A. 8, 1942) where in a suit for damages for violation of the anti-trust laws, it was held that the relief was not common because the damages to each of the plaintiffs would be different.

An entirely different construction was applied in *Oppenheimer* v. *F. J. Young & Co.*, 144 F. (2d) 387 (C. A. 2, 1944) and *Independence Shares Corp.* v. *Deckert*, 108 F. (2d) 51 (C. A. 3, 1939), where the claimants were stockholders and bondholders, respectively, and the damages claimed could be measured according to a common formula or pattern, although the amounts would be different as to different claimants.

On the other hand in *McGrath* v. *Abo,* 186 F. (2d) 766 (C. A. 9, 1951), the Court held that the phrase "common relief" covered cases where all plaintiffs sought the same type of relief such as damages or an injunction as distinguished from cases where some plaintiffs sought damages while others sought an injunction.

Still another construction is found in *Newsom* v. *E. I. du Pont de Nemours Co.,* 173 F. (2d) 856 (C. A. 6, 1949); certiorari denied 338 U. S. 824; and *Fisch* v. *General Motors Corp.,* 169 F. (2d) 266 (C. A. 6, 1948); certiorari denied 335 U. S. 902, where numerous employees sought to recover on individual contracts of employment, unpaid wages for overtime work under the Fair Labor Standards Act. It was held the relief sought was not common.

Consistent with the holding of the District Court in this case is *Gilbert* v. *Clark,* D. C. Mass., April 7, 1952, 17 Fed. Rules Serv. 23a33, which is a case very similar to this case and in which the court held that no "common relief" was sought because the representations were made separately to each individual member of the alleged class.

This conflict regarding the meaning of the term "common relief" as used in Rule 23(a)(3) presents a question of general importance which should be resolved.

6. The decision of the Court of Appeals is in conflict with the purpose and intent of the Rules for joinder of parties and class actions.

This Court has granted certiorari where the decision of a Court of Appeals will cause serious hindrance to the effective administration of the law. *Rothensies* v. *Electric Storage Battery Co.,* 329 U. S. 296 (1946).

This decision of the Court of Appeals, based as it was on a thoroughly erroneous and conflicting view of the Robinson-Patman Amendment, led to a construction of the Rules on joinder of parties and class action which the Court of

Appeals itself recognized would cause confusion and injustice. The confusion which it will cause district courts and the bar in general in the trial of damage cases involving violation of the Robinson-Patman Amendment warrants this Court's attention.

If district courts are compelled, as the Court of Appeals says, to permit hundreds of claimants for damages to join in one suit their separate claims for damages for violation of the Robinson-Patman Amendment, either by way of application of the joinder rule or the class action rule, the orderly trial of such cases is practically impossible.

In the instant case there are four plaintiffs joined together bringing seventy-two additional claimants as members of the class. This means seventy-six separate claimants, each maintaining a separate claim for damages against Anheuser-Busch for discrimination in price under Section 2(a) of the Act, and discrimination in services and facilities under 2(e) of the Act, and an entirely separate claim against Home Delivery for knowingly accepting a discriminatory price.

Each claim of price discrimination will involve question whether or not there was, in fact, a difference in price, whether it had the effect of substantially lessening competition between the particular claimant and Home Delivery, whether the differences in price made only due allowances for difference in cost and whether the lower price was made in good faith to meet competition—all in addition to the question whether the particular respondent was actually damaged.

The claims under Section 2(e) of the Act will involve as to each respondent the question whether or not the services claimed to have been rendered Home Delivery were disproportionate to any services which a particular claimant might be entitled to receive.

The trial of such a case can only result in a conglomerate

mass of evidence which the court and jury would have to try to segregate and apply to the seventy-six separate claimants.

Joinder of claims for damages of the Robinson-Patman Amendment cannot be compared to joinder of claims for damages for violation of the Sherman Act where often a single conspiracy or combination applies with equal force to a number of claimants, and the single proof of the conspiracy or combination proves the violation of the anti-trust laws as to all claimants. In a Robinson-Patman case the proof of violation as to one claimant proves nothing as to another because the circumstances and conditions under which sales were made to each claimant must be examined to determine if the lower price or more favorable services and facilities actually resulted in a violation.

The Federal Rules are devised to promote the ends of justice and not to defeat them, *Hormel* v. *Helvering*, 312 U. S. 552 (1941). And a construction of the Rules that produces confusion and injustice in the trial of cases deserves the attention of this Court.

Conclusion.

For the foregoing reasons the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

No. [redacted] 90

October Term, 1951.

Armando Rivera, Incorporated, et al.,

Petitioners,

vs.

Matthew S. Kane and Rose Kane, copartners, doing business as Mike & Matt's Lounge, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Respondents' Brief in Opposition.

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INDEX.

	PAGE
Matters Involved	2
Reasons For Not Granting Writ	4
Conclusion	9

Cases Cited.

Akely v. Kinnicutt, 238 N. Y. 466, 472, 474	6
Akely v. Kinnicutt, 208 App. Div. 487, 489	7
Farmers Cooperative Oil Co. v. Socony-Vacuum Oil Co., 133 F. (2) 101	7
Lesnik v. Public Industrials Corp., 144 F. (2) 968, 973	5
Montgomery Ward & Co. v. Langer, 168 F. (2) 182	8
Weeks v. Bareco Oil Co., 125 F. (2) 84, 90, 93	3, 8

Rules Cited.

Federal Rules of Civil Procedure:	
Rule 1	5
Rule 20 (a)	5
Rule 23 (a)(3)	7
Rule 43 (e)	3

Text Books and Articles.

2 Barron & Holtzoff Fed. Prac. and Proc. p. 154	7
3 Moore's Fed. Prac. (2nd Ed.) p. 2719	7
3 Moore's Fed. Prac. (2nd Ed.) p. 3455	7
65 Harvard Law Rev. 890	8

IN THE

Supreme Court of the United States

No. 804

OCTOBER TERM, 1951.

ANHEUSER-BUSCH, INCORPORATED, et al.,
Petitioners,
vs.
MATTHEW S. KAINZ and ROSE KAINZ, copartners, doing business as MATT & NEAL'S LIQUORS, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respondents' Brief in Opposition.

May It Please The Court:

Petitioners seem to have misapprehended the record, and to have overlooked the fundamental purposes for the adoption of Rules 20 (a) and 23 (a) (3) of the Federal Rules of Civil Procedure.

MATTERS INVOLVED.

Four Chicago liquor dealers, respondents here, joined in an action for treble damages and injunctive relief on behalf of themselves, and 68 other liquor dealers in the Chicago area named in Plaintiffs' Exhibit 1, attached to the complaint, alleging violations of the Robinson-Patman Act. All of them were located in Chicago, except one who was situated in Harvey, a suburb of Chicago. The primary defendant was Anheuser-Busch, Inc., of St. Louis, Missouri, which produced, shipped and wholesaled Budweiser beer to the liquor dealers as well as the secondary defendants. The secondary defendants were likewise engaged in the retail business in Chicago, and were at all times in controversy engaged in direct and open competition with the liquor dealers in the resale of that beer to the purchasing public in Chicago and its suburbs.

The liquor dealers alleged that the primary defendant discriminated against them by selling the beer substantially cheaper to the secondary defendants so that the latter were enabled to undersell the liquor dealers by a very considerable margin; that the primary defendant knowingly granted, and the secondary defendants knowingly received, the price discriminations; and that the primary defendant also discriminated against the liquor dealers by making it a practice, whenever any member of the purchasing public phoned or contacted its Chicago office to purchase that beer, to refer such customers to the secondary defendants, and that the primary defendant did not accord that service and facility to the liquor dealers on *any* terms. (R. 3-12)

The defendants, petitioners here, moved to dismiss the class action; to drop all the named plaintiffs, except one, as misjoined parties and sever their claims; and to require the named plaintiffs to state their claims in different counts (R. 12).

In connection with these motions, they procured the entry of an order giving them leave to file affidavits in support thereof; giving the plaintiffs time to file affidavits in opposition thereto; and giving them time to file response affidavits (R. 16).

The defendants filed only one affidavit, which set forth that there were about 2770 liquor dealers in the Chicago area, and that the purchases of the plaintiffs and the liquor dealers represented by them, "have been by such persons individually and severally, at different times, under different circumstances, in different amounts and by separate and independent transactions". (R. 15) What the "different circumstances" were did not appear.

Plaintiffs filed an affidavit which in some detail showed that "the only difference between the claims of each of the plaintiffs and the parties named in Plaintiffs' Exhibit 1, is in respect to the amounts thereof, due solely to the differing quantities of beer purchased; that other than such difference, the same proof and the same witnesses will be offered in support of each and every one of said claims", and that the substantial questions of law and fact were the same as to each claim. (R. 17, 18)

Defendants filed no response affidavit, and interposed no motion challenging the form or sufficiency of the plaintiffs' affidavit.

This affidavit practice is provided in Federal Rule 43 (e), and was sanctioned in *Weeks* v. *Bareco Oil Co.*, 125 F. (2) 84, 93, (C.C.A. 7.)

The defendants made no motion to dismiss the action because of failure to state a claim upon which relief can be granted.

The defendants did not see fit to set forth in their affidavit the defenses, if any, which they considered they had to the complaint, so that their references in their Petition to their supposed defenses (Pet. 19) are unsupported by the record.

The facts, therefore, are those contained in the plaintiffs' affidavit, which are undenied and unchallenged so far as the record is concerned.

In view of the thoroughness of the decision of the Court of Appeals, we do not deem it necessary to impose upon this Court an elaborate brief, but shall content ourselves with a few general observations.

Reasons For Not Granting the Writ.

The defendants assert in their Petition (p. 6) that "the Court of Appeals decided that violation of the Robinson-Patman Amendment was established by a mere granting of a lower price or more favorable services and facilities and that there was nothing left to the case but the question of damages to be awarded to each plaintiff;" and at pp. 12-16 of their Petition they devote considerable argument to show that the decision of the Court of Appeals was in error in that regard.

But the Court of Appeals did not so decide in the case at bar, and we can find no language in the decision which lends support to the defendants' assertion. The Court of Appeals expressly said: "We are concerned here, however, only with procedural questions." (R. 44); and its *per curiam* opinion denying the petition for rehearing makes that view very clear. (R. 68, 69)

The defendants have steadfastly sought to apply to the Federal Rules of Civil Procedure an exceedingly strict construction which is not in consonance with the purposes

thereof. Federal Rule 1 provides that "they shall be construed to secure the just, *speedy* and *inexpensive* determination of every action". (Italics ours)

Judge Clark, a member of the Advisory Committee on the drafting of the Federal Rules, said in *Lesnik* v. *Public Industrials Corp.*, 144 F. (2) 968, 973, (C.C.A. 2) anent the Federal Rules:

> "These rules are a part of that fundamental tenet of modern procedure that joinder of parties and of claims must be greatly liberalized to provide at least for the effective settlement at one time of all disputes of which parts are already before the court • • • actually they compress and desirably reduce the bulk and amount of the federal litigation."

Defendants claim that even the Court of Appeals recognized that the Federal Rules, as construed by that Court, placed an *impossible* burden on the trial court; and they conclude that such a construction that produces confusion and injustice in the trial of cases, deserves the attention of this Court. (Pet. 11, 20)

The Court of Appeals, however, did not so state. It observed, merely, that "perhaps • • • it may eventuate that the expedient provided is not efficacious in improving practice and procedure. But that possibility does not authorize us so to interpret the rules as to nullify them." (R. 51) And the Court also observed that the purpose was to reduce multiplicity of suits and speed up trials. (R. 51)

The Reporter's Note to Federal Rule 20 indicates that the provisions for joinder are in substance the provisions found in England, California, Illinois, New Jersey and New York.

Those jurisdictions do not seem to have experienced the "confusion and injustice in the trial of cases" complained of by the defendants.

Perhaps one of the leading cases on this point is *Akely* v. *Kinnicutt,* 238 N.Y. 466, affirming 208 App. Div. 487, where an action was brought by 193 plaintiffs, "each one claiming to have an individual, separate and independent cause of action against the defendants for damages caused by the fraud of the latter." The New York Court of Appeals upheld the joinder, and passed upon and overruled each and all of the points stressed by the defendants in the case at bar.

Referring to Sec. 209 of the Civil Practice Act of that state, which likewise required that the causes of action arise out of the same transaction, and that common questions of law or fact be present, before there could be a joinder, the Court said, p. 472:

> "The statute before us is substantially a copy of a provision in the English Practice Act, and of course its purpose is to lessen the delay and expense of litigation by permitting the claims of different plaintiffs to be decided in one action instead of many, when, although legally separate and distinct, they nevertheless so involve common questions and spring out of identical or related transactions that their common trial may be had with fairness to the different parties. The statute is a remedial one in promotion of the purpose in these times so insistent and widespread that the delays and expenses of litigation shall be lessened where possible, and as such it is to be liberally construed."

And at p. 474:

> "The purchase by a plaintiff of his stock is not robbed of its character as a 'transaction' because • • • the transaction was not a dual one occurring between the plaintiff and the defendants, and the many purchases by plaintiffs respectively do not lose their character as a series of transactions because they occurred at different places and times extending through many months."

The Appellate Division, in the same case, 208 App. Div. 487, put the situation rather forcefully when it said, p. 489:

> "The opposite course which defendants claim they would prefer, would subject the defendants to vexatious litigation multiplying the case 193 times, the taking of depositions, whenever required, in 193 actions, although they are identical, and the use of 193 judges and juries in separate trials."

Professor Moore in 3 Moore's Federal Practice (2nd Ed.) p. 2719, said:

> "Restrictive joinder provisions were left in the past. Joinder of parties is treated as a trial problem—not a pleading problem."

The spurious class action, provided in Federal Rule 23 (a) (3) is likewise merely a permissive joinder device, and is a counterpart of Rule 20 (a) to cover a situation where the parties are so numerous as to make it impracticable to bring them all before the court. The joinder is a matter of economy and efficiency to again avoid a multiplicity of suits. This rule requires that a common relief be sought; and as shown in the decision of the Court of Appeals in the case at bar, every circuit, except the Eighth, in *Farmers Cooperative Oil Co.* v. *Socony-Vacuum Oil Co.*, 133 F. (2) 101, has held, where the point has been presented, that Federal Rule 23 (a) (3) covers cases where each plaintiff has a right to recover damages for a wrong done all, even though the amount of damages recoverable differs for the different plaintiffs. Any other holding would in effect restrict the spurious class action to cases involving equitable relief.

The *Farmers Cooperative Oil Co.* case, so far as it restricts the definition of "common relief", has been severely criticized by leading text writers. (3 Moore's Federal Practice (2nd Ed.) p. 3455; 2 Barron & Holtzoff Fed. Prac. & Proc., p. 154, and footnote 50)

And in *Montgomery Ward & Co.* v. *Langer*, 168 F. (2) 182, 188, the same Court of Appeals for the Eighth Circuit, composed of different judges, said this with reference to Rule 23:

> "The usefulness of the device in its new environment will depend largely upon the attitude of the courts. If the device is to be loaded down with arbitrary and technical restrictions, it will serve no very useful purpose in the enlarged field. * * * Like most procedural devices, its usefulness is susceptible to being nibbled away by those who regard it as an unwelcome stranger in an unsuitable environment."

It is not amiss to refer to an article in 65 Harvard Law Review 890 (March, 1952) where the District Court decision in the case at bar was reviewed and disagreed with. The author there concluded:

> "This case typifies those situations in which violation of a statute may give rise to many small, similar claims. * * * Frequently such claims are not pressed, either because the size of the claim is outweighed by the cost of litigation * * * or because the prospective plaintiff is apathetic. Liberal permission to use joinder and the class action would seem desirable to prevent defendants from taking advantage of these factors to avoid suit by demanding that each claim be brought separately."

The same thought was expressed in *Weeks* v. *Bareco Oil Co.*, 125 F. (2) 84, at 90, (C.C.A. 7), where the Court said in an analogous case:

> "To permit the defendants to contest liability with each claimant in a single, separate suit, would in many cases give defendants an advantage which would be almost equivalent to closing the doors of justice to all small claimants. * * *
>
> "Defendants would probably not suffer from such a joinder assuming they must stand suit. In fact, it should be beneficial to them—they have but one suit to meet instead of innumerable ones. * * * If the de-

fense is to create barriers and to make litigation expensive, so as to avoid trial, the opposition by defendants to a single trial can better be understood and appreciated."

CONCLUSION.

Petitioners' contentions, if sustained, would have a far-reaching and devastating effect upon the policy and purposes of the Federal Rules of Civil Procedure. The Robinson-Patman Act was avowedly designed for the protection of the small business man; but if it can afford him no practical, inexpensive remedy because of the operation of the Federal Rules, its provisions would be futile.

The petition for writ of certiorari does not show that special and important reasons exist for the granting thereof, and should be denied.

Respectfully submitted,

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